Supreme Court, U. S.
FILED
MAY 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-999

JANE COE, *et al.*,

Petitioners,

— against —

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

STEVEN J. COLE
NLSP Center on Social Welfare Policy and Law, Inc.
95 Madison Avenue
New York, N. Y. 10016
(212) 679-3709

Attorney for all Petitioners
(and on behalf of all counsel)

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
35

TABLE OF AUTHORITIES

PAGE

Cases:

Calvert Cliffs' Coordinating Comm. v. *Atomic Energy Comm.*, 449 F.2d 1109 (D.D.Cir. 1971) 5

Dandridge v. *Williams*, 397 U.S. 571 (1970) 8

Doe v. *Maher*, 414 F. Supp. 1368 (D. Conn. 1976), appeal pending, *Maher* v. *Doe*, No. 76-878 ..... 7, 9

Fusari v. *Steinberg*, 419 U.S. 379 (1975) 8

Gerstein v. *Pugh*, 420 U.S. 103 (1975) 9

Holmes v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968) 3

Hornsby v. *Allen*, 326 F.2d 605 (5th Cir. 1964) 3

Judice v. *Vail*, —— U.S. ——, 97 S. Ct. 1221 (1977) 9

Kremens v. *Bartley*, 45 U.S.L.W. 4451 (May 16, 1977) 8

Morton v. *Ruiz*, 415 U.S. 199 (1974) 3, 5

Rosado v. *Wyman*, 397 U.S. 397 (1970) 8

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 3

Townsend v. *Swank*, 404 U.S. 282 (1971) 8

White v. *Roughton*, 530 F.2d 750 (7th Cir. 1976) 3

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 3

PAGE

Statutes and Regulations:

P.L. 94-88 ..... 1, 6, 7

42 U.S.C. §602(a)(26)(B) 2, 7, 9

45 C.F.R. §232.12 5

C.G.S.A. §17-82b 8

Conn. Public Assistance Manual, Vol I, Ch. III, Supp. IV-D, §404.6 4

Other Authority:

K.C. Davis, Discretionary Justice, A Preliminary Inquiry (1971) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-999

JANE COE, *et al.*,

Petitioners,

— against —

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

The Solicitor General's Brief in Opposition confirms that the district court incorrectly construed the Social Security Act provisions at issue in this case. His brief actually supports the granting of this petition and the affirmance of the appeal in *Maher* v. *Doe*, No. 76-878. (Petitioner Alaska has previously filed a brief as *amicus curiae* in *Maher*, urging affirmance.)

1. The Solicitor agrees with our contention that the sole basis for the district court's interpretation of P.L. 94-88 was incorrect. Resp. Br., pp. 8-9, n. 10.[1] The Solicitor

[1] The Solicitor concedes that the provision in P.L. 94-88 providing for an August 1975 effective date "unless otherwise speci-

agrees that the good cause/best interests exceptions to the cooperation and child support enforcement requirements are presently in effect. This admission alone justifies the granting of *certiorari* and reversal since there is no other basis upon which Respondent can prevail.

2. The Solicitor argues, however, that while Congress intended the good cause/best interests exceptions to be effective prior to the effectiveness of the HEW standards, they may be applied only on an *"ad hoc"* basis, without standards to guide state decision-making. See Brief of the United States as *Amicus Curiae, Maher* v. *Doe,* No 76-878, at 4; Resp. Br. at 5-6, 9-10. Indeed, his view of the Act would forbid objective, across-the-board standards to be developed and utilized by the states. Resp. Br. at 10. Petitioners agree that the Act forbids states from establishing their own standards, see *infra,* p. 8, but we disagree that *ad hoc* decision-making is authorized by the Act.

Nothing in the federal statute or its legislative history authorizes or requires the states to make *ad hoc* exceptions to the cooperation and child support requirements, or authorizes the Respondent to allow the states to do so. Congress' intent in this regard was expressed in its specific command that good cause/best interests determinations be made by the states "in accordance with *standards* prescribed by the Secretary, which *standards* shall take into consideration the best interests of the child on whose behalf aid is claimed." 42 U.S.C. §602(a)(26)(B) (emphasis added). Congress not only rejected the notion of standard-

fied" was not intended, as Judge Corcoran believed it was, to postpone the effective date of the good cause/best interests exception.

less decision-making, but it deprived the states of power to devise their own standards.[2]

Congress' rejection of standardless decision-making reflects generally accepted Constitutional due process requirements. See, e.g., *White* v. *Roughton,* 530 F.2d 750, 754 (7th Cir. 1976); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 265 (2d Cir. 1968); *Hornsby* v. *Allen,* 326 F.2d 605, 610 (5th Cir. 1964). See also *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974). Indeed, even if the statutory term "best interests of the child" were ultimately held applicable to *ad hoc* decisions, see n. 2, *supra,* and held to provide a sufficiently specific standard at least for due process purposes, it is doubtful that Congress either intended or had the power to prevent states such as Petitioner Alaska from providing across-the-board standards to guide local welfare administrators in the application of that vague term. Cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969). Such standards would be needed in order to minimize arbitrary and disuniform decision-making, and to permit persons subject to the statutory requirements to make a realistic and intelligent assessment of whether or not they have a valid claim to an exception. See, *e.g.,* K.C. Davis, Discretionary Justice, A Preliminary Inquiry (1971), at 102.

The Solicitor contends, however, that absent *ad hoc* decision-making Congress' intent would be frustrated. He reaches this result by positing the two other possible interpretations of the statute, both of which he then claims would defeat the legislative purpose. See Resp. Br., at 9.

[2] Moreover, nowhere is it even claimed by the Respondent that the *ad hoc* decisions are required to be guided by the statutory standard "best interests of the child."

One such interpretation, however, the one urged by Petitioners, does not defeat Congress' intent.

Thus, if the *mandatory* aspects of the child support program were enjoined, cooperation and paternity and support enforcement would continue to proceed in those cases in which mothers do not contend that their cooperation or the state's support enforcement would injure the child, and in those cases the children and the states would benefit from the child support provisions. Nothing in the injunction requested by Petitioners would bar enforcement in the likely majority of cases in which the mother is quitee willing to cooperate.[3]

On the other hand, because cooperation is being compelled pursuant to HEW's published regulations, some children are presently being harmed. The harm to these children is conceded by the Solicitor to be a frustration of Congress' intent. Resp. Br. at Reg. 9. The relief requested by Petitioners, an injunction against the program's compulsory features, would accommodate Congress' specific desire to avoid injury to children because of the federal child support provisions, without doing violence to any other Congressional purpose.[4]

---

[3] Indeed, pursuant to the *Maher* injunction, Connecticut informed its eligibility workers that a mother may not now be found ineligible "if she is unwilling to cooperate." Conn. Public Assistance Manual, Vol. I, Ch. III, Supp. IV-D, §404.6. Obviously a mother may cooperate if she wants to because she believes it will not hurt her child.

[4] Of course, as soon as the Secretary's standards are final, those cases claiming an exception would be reviewed to make sure that the mothers' claims are sustainable under the standards. Again, in compliance with the *Maher* injunction, Connecticut responsibly advised its workers that "[p]ending the establishment of the aforesaid [HEW] standards, a tickler will be established by the support workers to review the case when a policy is issued." *Ibid.*

It is conceded, of course, that if Petitioners prevail there will be some mothers who ultimately will be found *not* to have good cause once the standards are available for application, despite their good faith claims. Given the fact that Congress hardly anticipated such an inordinate delay by HEW in complying with the statutory mandate, *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm.*, 449 F.2d 1109, 1120 (D.C. Cir. 1971), this was undoubtedly a problem Congress considered insignificant given the alternative.

Also, the Court should not lose sight of the fact that even at this late date the Respondent promises final rules only by the "end of the calendar year," Resp. Br., p. 7, n. 6. Even if this promise is kept, Congress has 60 days to review those standards, and may well disapprove them if they do not accord with Congress' wishes. Even if this timetable is met, and Congress does not disapprove, Petitioners and others will still wait for enforcement of P.L. 94-88 until March 1978, ten months from now and 2½ years after its effective date.

3. In addition, despite the Solicitor's contention in this litigation that *ad hoc* good cause determinations should be made by the states, *HEW in fact has not implemented this interpretation of the Act.* For this reason too, Petitioners are entitled to relief, and *certiorari* is warranted.

First, the published regulations of the Secretary, 45 C.F.R. §232.12, do not provide for the supposed state *ad hoc* exceptions. See *Morton* v. *Ruiz, supra,* 415 U.S. at 230-36 (1974).

Second, there has been no unpublished HEW policy directive *requiring* the states to make good cause determinations on an *ad hoc* or any other basis. While the Solicitor has informed the Court that he was advised by the Secretary that states "should" make their own good cause/best interests determinations on a case-by-case basis, Resp. Br. at 5 and at 9, no such instructions have ever been communicated to the states. Even the November 1975 memo cited by Respondent for authority states only that HEW "would *hope* that the IV-D agency would . . . utilize care and com-

mon sense." See Appendix F, p. 44, Jurisdictional Statement, *Maher* v. *Doe,* No. 76-878 (emphasis added).[5]

Similarly, while sanctions for non-cooperation are required to be imposed by welfare agencies administering Part A of Title IV, *not* the IV-D child support agencies, such IV-A agencies have not been provided by HEW with any instructions regarding the alleged case-by-case exceptions. Though it is urged that the cited November 1975 memo applies to IV-A agency eligibility determinations, Resp. Br. at 5, n. 3, even though on its face it refers only to implementation of the child support enforcement responsibilities of the IV-D agency, no citation is provided to any federal communication to the states that this policy applies to IV-A agencies. Indeed, Petitioners Coe and Doe *both* received fair hearing decisions from the Pennsylvania IV-A agency finding that cooperation would be against their children's interests, but the state IV-A agency found in each case that since there were no present regulations authorizing exceptions, sanctions would have to be imposed.

In short, at the most, the Respondent's *ad hoc* decision-making theory is an interpretation of P.L. 94-88 which only provides relief to those state welfare agencies that are aware of HEW's supposed case-by-case exception policy and that wish to be freed of the *per se* rule of the Secretary's regulations. See, Resp. Br. at 10. This litigation-tailored theory provides no relief to AFDC beneficiaries such as Petitioners who do not have the fortune to

[5] This is implicitly acknowledged by the Solicitor's statement in his *Maher* amicus (p. 7, n. 11) that states "*may* follow the Secretary's *advice* and apply *ad hoc* 'good cause' exceptions on a case by case basis." (Emphasis added.)

live in states that conclude that they are authorized to make *ad hoc* exceptions, and that choose to do so. Clearly, however, P.L. 94-88 was designed not simply to protect *states* from loss of federal matching funds, but to protect *children* from possible injury as a result of the new federal child support provisions.

4. The Solicitor's argument that the pendency of *Maher* v. *Doe,* No. 76-878, does not warrant *certiorari* before judgment since that case is allegedly not ready for decision, proves specious upon close examination.

First, the purported lack of clarity to the *Maher* judgment simply does not exist. All parties in *Maher* agree that the judgment in that case bars the state from terminating aid for non-cooperation until such time as the cases of non-cooperative mothers can be evaluated under mandated HEW standards. The *judgment* in *Maher* so provides. See Jurisdictional Statement, *Maher* v. *Doe,* No. 76-878, App. B; *Doe* v. *Maher,* 414 F. Supp. 1368, 1382 (D. Conn. 1976).[6]

The Solicitor apparently is confusing the *judgment* which this Court is asked by Connecticut to review, with the *opinion* of the lower court. Even if it were true that the opinion could be read as somewhat ambiguous, a point with which we disagree, the judgment speaks for itself and must be evaluated on its own merits for consistency

[6] The *Maher* judgment forbids Connecticut from terminating the AFDC payments of non-cooperative mothers until "full compliance" with §402(a)(26) "as amended," i.e. full compliance with HEW's best interests standards. The *judgment* in *Maher* thus conflicts with the judgment in this case, which authorizes Respondent to enforce §402(a)(26) as it read *prior* to amendment and without requiring compliance by the states with the best interests standards.

or inconsistency with federal law. Indeed, if clarification *were* needed, the judgment fully supplies this Court with the district court's actual intent. If the *Maher* appellees were entitled to the injunction that was in fact issued, they are entitled to an affirmance, whether or not the court's legal reasoning or conclusions of law were as clearly written as the Solicitor might have preferred. Cf. *Dandridge* v. *Williams,* 397 U.S. 471, 475 n. 6 (1970).

Second, the enactment of the new state statute has no relevance to the issues on this appeal and provides no justification for a remand to the district court. The statute on its face requires the Connecticut Commissioner to "adopt by regulation . . . standards as to good cause and best interests of the child . . . ." C.G.S.A. §17-82b, quoted in the Brief of the United States as *Amicus Curiae* in *Maher* v. *Doe,* No. 76-878, p. 9. But, as the Solicitor candidly advised, it is HEW's position that "the states are not authorized to amend their Part IV-A plans to include formal standards for implementing the 'good cause' exception . . . ." Resp. Br. at 5. See also Resp. Br. at 10.

Given the fact that the state statute may not be implemented by Connecticut prior to issuance of HEW's standards, at least while Connecticut continues to receive federal AFDC funds, e.g., *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Rosado* v. *Wyman,* 397 U.S. 397 (1970), the new statute has no bearing on the *Maher* appeal. Unlike *Fusari* v. *Steinberg,* 419 U.S. 379 (1975), cited by the Respondent, and *Kremens* v. *Bartley,* 45 U.S.L.W. 4451 (May 16, 1977), where intervening relevant state statutes were fully in effect and therefore potentially changed the nature of the state programs under attack, the new Connecticut statute

is inoperative. It thus has no bearing on the Connecticut program and, therefore, the federal issues at this time.[7]

Finally, the Respondent's suggestion that *Judice* v. *Vail,* —— U.S. ——, 97 S. Ct. 1211 (1977), might prevent this court from reaching the merits in *Maher,* see Resp. Br. at 8, fails to take account of the fact that with respect to the common issues raised by *Coe* and *Maher, Judice* is irrelevant since no injunction against state proceedings is involved. The *Maher* injunction restrains Connecticut from denying welfare eligibility *and* from proceeding with contempt citations. The injunction against imposition of the eligibility sanction does not implicate any state judicial proceeding, and *Judice* (and the comity cases on which it is based) does not affect a federal court's power to compel prospective compliance with federal AFDC statutory requirements. Cf. *Doe* v. *Maher, supra,* 414 F. Supp. at 1382 (Newman concurring).[8]

---

[7] Respondent's position that Connecticut (and Alaska) are not free to adopt good cause standards is clearly a correct one. 42 U.S.C. §602(a)(26)(B) explicitly requires that good cause exceptions be made by the states under HEW standards. There is no reason to remand *Maher* to the district court for that court to make such an obvious determination, particularly in light of the prior remand in that case, and all of the factors necessitating a prompt resolution of the federal issues which are set forth in the Petition for Certiorari in this case.

[8] *Judice* is also inapplicable to the aspect of the judgment barring contempt citations. The district court in *Maher* found that the Connecticut scheme did not allow the federal plaintiffs to raise the federal issues in a defense to the contempt proceeding, *Doe* v. *Maher, supra,* 414 F. Supp. at 1375-77. See *Judice* v. *Vail, supra,* 97 S. Ct. at 1218; *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

CONCLUSION

The petition for a writ of *certiorari* before judgment should be granted, and the judgment below should be summarily reversed. In the alternative, if probable jurisdiction is noted in *Maher* v. *Doe*, No. 76-878, this petition should be granted and the cases set down for argument together.

Respectfully submitted,

STEVEN J. COLE
NLSP Center on Social Welfare
Policy and Law, Inc.
95 Madison Avenue
New York, N. Y. 10016
(212) 679-3709
Attorney for all Petitioners
(and on behalf of all counsel)

May 31, 1977